No. 10950

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONTRACTORS, PACIFIC NAVAL AIR BASES and LIBERTY MUTUAL INSURANCE COMPANY, a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, United States Employees' Compensation Commission for the Thirteenth Compensation District, and WILLIAM DONOHO,

Appellees.

OPENING BRIEF OF APPELLANTS.

On Appeal From the District Court of the United States for the Northern District of California, Southern Division

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Appellees.

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Statement of the Case.

Between March and September of 1942, appellee William Donoho, was employed at a military base outside of the United States, to-wit: Samoa. He claims to have contracted pulmonary tuberculosis while working there for appellant, Contractors, Pacific Naval Air Bases. For this illness he sought compensation on his return to the Continental United States.

His application resulted in a compensation order made on Feb. 24, 1944, by Warren H. Pillsbury, Deputy Commissioner, United States Compensation Commission for

the Thirteenth Compensation Commission District (hereinafter referred to as the "Deputy Commissioner").

Appellants being dissatisfied with the compensation order and deeming it to be contrary to law, thereupon filed their Complaint for Injunction in the District Court of the United States, Northern District of California, Southern Division, on July 6, 1944, as authorized by 42 *U. S. C. A.* 1651 to 1654 and *U. S. C. A.* 33, par. 921, claiming that the order was contrary to law in the following particulars:

> "(a) That there was no substantial evidence to warrant the Findings of Fact in said order that said respondent Donoho while employed, as in said Compensation Order alleged, contracted pulmonary tuberculosis as a result of conditions of his employment.
>
> "(b) That there is no substantial evidence to support the Findings of Fact that claimant is entitled to compensation at the rate of $25.00 per week or any other rate.
>
> "(c) That said Finding of Fact, and particularly those portions thereof which read: 'That said active tuberculosis was caused to develop and became disabling either by contraction of original infection from unknown sources or by reactivation of a previous undiscovered and arrested pulmonary tuberculosis, by conditions of his employment above mentioned, (6) principally overwork and exposure' do not support the Award of Compensation made in said Compensation Order." [R. 8-9.]

To this complaint the Deputy Commissioner interposed a Motion to Dismiss Bill of Complaint [R. 12-13] which was granted in an Order Dismissing Bill [R. 14] after Points and Authorities, together with a Transcript of the Testimony taken at the hearing before the Deputy Com-

missioner had been furnished to the United States District Court in San Francisco. The case is before this Honorable Court following the Order Dismissing Bill filed September 13, 1944, which is in the nature of a final judgment.

Jurisdictional Statement.

1. Compensation orders made pursuant to the Defense Bases Act of August 16, 1941, as amended December 2, 1942 (42 *U. S. Code* 1651 to 1654) may be judicially reviewed in the same manner as awards made under the Longshoremen's and Harbor Workers Compensation Act.

42 *U. S. Code* 1653, subdivision b.

2. Therefore a complaint for injunction is the proper method to seek a judicial review of compensation orders made by a Deputy Commissioner of the United States Employees' Compensation Commission under the provisions of the Defense Bases Act; and a compensation order made by the Deputy Commissioner may be set aside if it is "not in accordance with law."

U. S. C. A. 33, par. 921.

3. This Honorable Court has jurisdiction to review the judgment of dismissal of the United States District Court under Section 225(a) providing:

> "The Circuit Court of Appeal shall have appellate jurisdiction to review by appeal final decisions—First: In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

U. S. C. A. 28, par. 225(a).

Assignment of Errors.

1. The District Court erred in making, signing and filing its order denying complainants' request for an injunction.

2. The District Court erred in making, signing and filing its order granting respondents' motion to dismiss the Bill of Complaint.

Questions Presented on Appeal.

1. Is there sufficient substantial evidence in the record to warrant the Deputy Commissioner's Finding of Fact that Appellee Donoho, while employed on the Island of Samoa, sustained injury by reason and in the course of his employment consisting of pulmonary tuberculosis?

2. Is a Finding of Fact in the alternative and speculative in its nature, reading as follows:

> "That said active tuberculosis was caused to develop and became disabling *either* by contraction of original infection from unknown sources *or* by reactivation of a previous undiscovered and arrested pulmonary tuberculosis, by conditions of his employment above mentioned, principally overwork and exposure"

sufficient to support a compensation award giving the applicant compensation for his condition?

ARGUMENT.

It is the position of appellants that the evidence before the Deputy Commissioner as reflected in the record before this Court [R. 27-67] does not contain substantial evidence to warrant the findings that Appellee Donoho sustained industrial injury entitling him to an award of compensation. Appellants claim that while findings of fact by the deputy commissioner are conclusive when based on evidence, an award is a nullity and must be set aside as a matter of law if there is no substantial evidence to support or warrant the findings of fact made.

It is likewise the position of appellants that findings of fact in the alternative leaving us in the dark as to the time and manner of contracting a disease and as to the time of its manifestation is the outcome of speculation, defective, and insufficient in law to sustain an award of compensation.

I.

A Compensation Order Must Be Supported by Substantial Evidence.

While it is the law that findings of fact of the Deputy Commissioner are binding upon the Appellate Court when supported by evidence, it is likewise the law that a compensation order is not in accordance with the law if it is not supported by substantial evidence.

We shall not cite from the numerous cases which hold that the Longshoremen's and Harbor Workers' Compensation Act shall be liberally construed in favor of the employee, nor shall we refer to cases which hold that the

compensation order will be sustained as long as it is supported by substantial evidence, because these principles have become well established in administrative law.

It is, however, equally well established that *there must be more than a scintilla of evidence to support the findings of fact,* that is to say, it is well settled that *the evidence must be substantial.* If it does not measure up to that standard, the courts in reviewing the action of an administrative tribunal will deem the findings of fact to be contrary to law. This rule has been uniformly adopted in all appellate reviews of administrative orders, but since we are bound in the present instance by the law applicable to review under the Longshoremen's and Harbor Workers' Compensation Act, we call attention only to cases which involve that legislation.

In *Speaks v. Hoage,* 78 F. (2d) 208, involving an appeal from such a compensation order the court said:

> "In Powell v. Hoage, 61 App. D. C. 99, 57 F. (2d) 766, 767, we said: 'We therefore reach the conclusion that the cases in which we may set aside an order of the Commissioner as "not in accordance with law" are only those in which it appears that there is an error of law, or in which the order of the Commissioner is not supported by substantial evidence, as well, of course, in those in which it is arbitrary and unreasonable. If the finding, however, is supported by substantial evidence, it is final.' "

The same rule was stated in similar language in *New Amsterdam Casualty Co. v. Hoage,* 47 F. (2d) 837, and

in *Liberty Mutual Insurance Co. v. Hoage,* 65 F. (2d) 822, besides many others to which there is no need to refer.

The power of the Deputy Commissioner in connection with the evidence is not arbitrary. While orthodox rules of evidence may be relaxed and while he is entitled to draw all legitimate inferences from the facts proved, he must view the evidence with a judicial mind. He is not allowed to indulge either in conjecture or speculation, and if he does indulge in conjecture, his order cannot be said to be in accordance with law and must be set aside. This was clearly expressed in *New Amsterdam Casualty Co. v. Hoage,* 46 F. (2d) 837, where the court said:

> "To infer that, when he sought permission to go up the street on a little business, he meant that he was going out to make an emergency purchase for the company, that he cashed the check for the purpose of obtaining money to pay for that purchase, and, when killed, was on his way to make the purchase, is to indulge in pure conjecture, inconsistent with the established facts. *An award based upon conjecture inconsistent with established facts and circumstances is manifestly so arbitrary and unreasonable as to be 'not in accordance with law.'* See Wheeling Corrugating Co. v. McManigal (C. C. A.) 41 F. (2d) 593, 594; Matter of Eldridge v. Endicott, Johnson & Co., 228 N. Y. 21, 25, 126 N. E. 254, 20 A. L. R. 1." (Italics ours.)

II.

No Industrial Accident Being Involved, the Order Cannot Be Sustained, Unless the Record Reveals "Such Occupational Disease or Infection as Arises Naturally Out of Such Employment." (33 U. S. C. A. Sec. 902(2).)

The appellee in the case before the Court claimed to have contracted tuberculosis while on the Island of Samoa. The findings are not clear, containing a provision in the alternative, that a dormant condition of tuberculosis may have been reactivated by appellee's occupational labors while on the island in question. As the evidence will show, it is not claimed that the cause of the tuberculosis was traumatic or that the condition was brought about by an industrial injury sustained in the course of the employment. Appellee is not entitled to an award therefor *unless he* brings himself within the language of the statute and *shows that he sustained an "occupational disease or infection" and that such occupational disease or infection arose "naturally out of such employment."*

It follows, therefore, logically and unavoidably that the disease must be associated with the employment, such as silicosis with work in a mine, plumbism or lead poisoning or glass blower's arm in the various occupations to which these are incident, all of which have the common characteristic that they are *"peculiar to the occupation engaged in by by the employee and * * * due to causes different from the ordinary hazards of employment as such. It arises from causes inherent in the nature and mode of work of a particular profession or industry, and represents the usual result or concomitant overwork of this nature." Campbell Workmens' Compensation*, Vol. 1, Par. 350. (Italics ours.)

Recent cases, especially in the State of California—and no one could well claim that the Supreme Court of the State of California is not liberal in its interpretation of compensation laws—have evolved the test that there must be a special exposure to the disease. In other words, the incidence of the disease must be greater among men engaged in the particular occupation than among the people in general in the commonalty in which the labor is performed. The most recent of these cases is *Bethlehem Steel Co. v. Industrial Accident Commission,* 21 Cal. (2d) 742, 135 Pac. (2d) 153, in which it is said:

> "It is well established in this state that compensation is not due merely for injury caused by disease contracted by an employee while employed. The injury must be one arising out of the employment, and where the injury is by disease, there must exist the relation of cause and effect between the employment and the disease. It is also true that to justify an award there must be an affirmative showing of a case within the statute and it must affirmatively appear that there exists a reasonable probability that the employee contracted the disease because of his employment. (San Francisco v. Industrial Acc. Com., 183 Cal. 273, 282 (191 P. 26).) It must further be shown that the disease contracted was not merely a hazard of the community but that the employee was subjected to some special exposure in excess of that of the commonalty. In the absence of such showing, the illness of the employee cannot be said to have been proximately caused by an injury arising out of his employment or by reason of a risk or condition incident to the employment. (Pattiani v. Industrial Acc. Com., *supra;* Pacific Employers Ins. Co. v. Industrial Acc. Com., *supra.*) The employee's risk of contracting the disease by virtue of the employment must be materially greater than that of the general

public, *i. e.*, the injury must be a natural or a reasonably probable result of the employment or of the conditions thereof. (Storm v. Industrial Acc. Com., 191 Cal. 4 (214 P. 874); Hartford Acc. & Ind. Co. v. Industrial Acc. Com., 140 Cal. App. 482 (35 P. 2d 366); Campbell's Workmen's Compensation, vol. 1, p. 248, sec. 247.)"

Other cases to the same effect from this jurisdiction are:

Pac. Employers Ins. Co. v. Industrial Acc. Com., 19 Cal. (2d) 622, 122 Pac. (2d) 570;

Childrens' Hospital v. Industrial Acc. Com., 22 Cal. App. (2d) 365, 71 Pac. (2d) 83.

This need of a special exposure is particularly applicable to cases of tuberculosis. In the last analysis the question of whether conditions of employment produces a greater incidence of tuberculosis among workers than is found among the commonalty in general in the locality where the work is performed, is a question of medical statistics.

It becomes plain from the undisputed rules concerning occupational diseases which have been just stated, that while tuberculosis may in some instances be held to be occupational in origin and, therefore, compensable, special conditions must be proved where that result is to follow. Such special circumstances were shown in the case of *Grain Handling Co., Inc., et al. v. Sweeny, et al.*, 102 F. (2d) 464, in which a preexisting condition of tuberculosis was reactivated by the inhalation of grain dust, a condition peculiar to that employment. In the majority of cases, however, that result cannot and does not follow, especially since the answer to the question whether the tuberculosis is occupationally caused must depend on

speculation. Thus exposure to tropical rain and heat, and varying temperatures do not produce this disease any more readily in a steward or male nurse than in any other occupation carried on in that community. A good discussion of this situation, where an award was *denied,* is found in *Hartford v. Industrial Acc. Com.,* 140 Cal. App. 432, 35 Pac. (2d) 366, in which it was claimed that:

> ". . . the testimony showed that employee Houlihan began working for the company in October of 1929 and continued until July, 1933, his title being that of shipping clerk, and included work in the office, cooler, smoke room and outside, which exposed him to extremes of heat and cold, smoke, ammonia gas and inclement weather. When he started such work he was healthy. Two years afterward he was examined for insurance and there is no evidence that tuberculosis was discovered. After some further time he started to lose weight, appetite and endurance, and later had 'pleurisy trouble' and 'colds.' He first knew he had tuberculosis on June 20, 1933, and was obliged to stop work early in July. There is no question that the employee was suffering from pulmonary tuberculosis which rendered him temporarily totally disabled. The evidence does not show that it was due to his employment.
>
> "The report of the assistant medical director for the commission was as follows: 'According to the record, this applicant was subjected to more than the usual hazard experienced by one in his type of employment. It is possible that continual exposures described would have predisposed to the lighting up of an inactive pulmonary tuberculosis. Naturally, such an opinion is merely surmise and conjecture. However, one can state positively that the duties of his employment as described would not be beneficial to him if he were susceptible to a tuberculosis lesion.'

"Petitioners' physician examined Houlihan and reported in part as follows, as to the cause of the tuberculosis: Dr. Campbell: 'The question as to the cause in this particular case is blamed on the hazard of his occupation where he spends an average of 8 or 9 hours daily but the balance of the time is free to do whatever he cares to. Why penalize the place where he was employed 8 or 9 hours a day and attach no importance to his home life, environment and habits during the balance of the day? A general answer to the question is that any condition that lowers the tone of the general system renders the tissues susceptible to the changes produced by the tubercle bacillus. The latter is of course the direct cause, a susceptibility to its influence may be acquired by heredity, syphilis, alcoholism, occupations such as the inhalation of foul air and irritating particles, residence in damp or overcrowded apartments, catarrhal inflammation of the respiratory tract or debility from any infectious disease, etc.' Dr. Smith: 'That this man is tuberculous is proved and he is now undergoing the proper treatment for his condition. That this condition is related to his employment in industry is extremely questionable, in my opinion. Tuberculosis is an infectious disease. This claimant does not set forth in any way any claim or any evidence to substantiate any claim that he was infected with tubercle bacilli while in his employment, and I know of nothing in such employment that would cause such infection. Just where he picked up the infection of tubercle bacilli is undoubtedly unknown to him and likewise to me; therefore I am of the opinion that his infection causing tuberculosis cannot be traced to his employment in industry. Whether or not his occupation contributed to his present condition in so far as it may be claimed that employment in a "cooler" may have brought about activity of a smoldering tuberculous infection, must be considered.

I know of no evidence to support such claim, and know of no reason why the mere presence of an individual in a room of this character should be more prone to develop tuberculosis. He makes no claim of any injury to his body but apparently is entirely dependent on the fact that he was working in a "cooler" in a packing house. At best a patient doing such work spends much less time at his occupation than he does outside his occupation, which hours are spent in rest and amusements which could just as readily be a factor in the development of tuberculosis as his work. I am therefore of the opinion that there is no relationship between the occupation in industry of this claimant and the tuberculosis from which he now suffers.'

". . . An injury, in order to be compensable under the terms of the Compensation Act, must have been sustained by the employee 'arising out of and in the course of the employment,' and must have been 'proximately caused by the employment.' (*Storm v. Industrial Acc. Com.*, 191 Cal. 4 (214 Pac. 875). It is not suggested in this case that any accident had occurred which had caused or contributed to applicant's condition. 'While the word "accident" has been eliminated from section 6 of the Workmen's Compensation Act, the phrase "arising out of and in the course of the employment" has been interpreted to mean that the injury must result by reason of the employment in which the employee is engaged, and not by reason of some inherent natural defect which simply culminates during the time of employment. . . . There is no presumption as contended by respondents that because an injury occurs in the course of the employment it arises out of or because of that employment.' (*Newton v. Industrial Acc. Comm.*, 204 Cal. 185; 267 Pac. 542, 60 A. L. R. 1279.) 'The burden is upon the applicant for

compensation to show that the injury arose out of as well as in the course of the employment.' (*Eastman v. Industrial Acc. Com.,* 186 Cal. 587, 593; 200 Pac. 17, 19.)

"In this case we have an employee suffering from pulmonary tuberculosis, a disease which for years has been studied, diagnosed and treated by those members of the medical profession whose research and experience have qualified them for that service and to whose judgment as experts on the subject of the disease their fellow practitioners defer. 'The rule,' as stated in *Simpson v. Industrial Acc. Com.,* 74 Cal. App. 239, 243; 240 Pac. 58), 'appears to be that whenever the subject under consideration is one within the knowledge of experts, only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue. It follows that in such cases neither the court nor the jury can disregard such evidence of experts, but on the other hand they are bound by such evidence even if it is contradicted by nonexpert witnesses. The same rule would of course apply to a proceeding before the industrial accident commission.' Testimony of probative value sufficient to support applicant's claim is entirely lacking. No expert witness has expressed an opinion that it is even reasonably probable that the condition of applicant was due to his employment, and an award may not be predicated upon a possibility which is 'merely surmise and conjecture.' It is not sufficient that the referee or commission be satisfied as laymen of the correctness of their view, but the law requires that they shall reach their conclusion on the basis of legally competent evidence. A mere surmise or conjecture does not constitute 'a foundation sufficient to support a finding of fact.' (*Simpson v. Industrial Acc. Comm., supra.*)

"The award is annulled."

III.

A Review of the Evidence Available to the Deputy Commissioner Shows That There Is No Substantial Evidence to Support the Conclusion That Appellee's Tuberculosis Was an Occupational Disease or Infection Arising Naturally Out of His Employment.

It remains for this Honorable Court to match the evidence contained in the record against the foregoing well established principles.

There were only two witnesses who testified on behalf of the appellee. It is true that a report was filed by a medical expert on behalf of appellants, but inasmuch as this report is favorable to appellants and since the case of William Donoho derives no strength from it, we shall not summarize it but restrict ourselves only to such testimony as is shown from the record to have been given by and on behalf of the employee.

The applicant testified that pursuant to contract he went to an Island Defense Base in the Pacific as a male nurse. [R. p. 5.] When he got there he went to work driving a truck. After approximately three months he felt constant fatigue. [R. p. 5.] He had a physical examination before he left and his lungs were found to be normal. [R. p. 8.] After his return he was fluoroscoped and X-rayed and sputum tests were made, all of which were found positive for tuberculosis. [R. p. 7.]

At the Island, applicant was subjected to excessive rain (190 inches a year), making outside working conditions disagreeable, so that he became soaked four or five times a day during the rainy season. After he drove the truck for a while [R. p. 9] he took the steward's place and was in charge of the Mess Hall, working

twelve, sometimes sixteen to eighteen hours, a day. [R. p. 10.] The temperature was around 90 to 100 degrees, with humidity very high. [R. p. 11.]

With respect to possible sources of infection, the testimony of the applicant was vague. He testified that native employees were working around the Mess Hall, who got sick and "I think tuberculosis among the natives in the Island might be common." However, he knew of no natives who actually had tuberculosis. [R. p. 11.] He testified that among approximately 300 white employees [R. p. 14] he knew of one whose case was diagnosed as tuberculosis [R. p. 12]; and as to another, the witness said "I understand the Navy authorities diagnosed his condition as tuberculosis," but he could not say definitely whether he had it or not. [R. p. 13.] Neither of these individuals coughed, to his knowledge. [R. p. 13.] However, no employee that had tuberculosis shared a room with the applicant [R. p. 15], and of the two cases just mentioned, the applicant lived with neither one, nor did he have close contact with either of them. [R. p. 20.]

Dr. Ford testified that the applicant was suffering from advanced pulmonary tuberculosis, which could have developed since March, 1942. [R. p. 25.] It is not possible to state from the X-rays or evidence whether there may have been an earlier or arrested inactive condition. [R. p. 25.] The witness was unable to express an opinion as to whether the case was one of primary tuberculosis, starting about the summer of 1942, or whether it might be a reactivation of an earlier condition. [R. p. 26.] He further stated: "Of course, it is not possible to develop tuberculosis without exposure to the tubercle bacillus." [R. p. 26, lines 16 to 20.] He stated further that it was possible to contract tuberculosis through casual contact.

However, he could not say that this was the case here. [R. p. 27.]

When asked whether the onset of acute fatigue would make it more possible that the disease was contracted in the fall or summer of 1942, the witness answered:

> "A. Well, that is the first subjective symptom. That is the first thing he noticed, his fatigue, and that is a common symptom of active tuberculosis. I cannot say that the disease started at this time, although it is quite possible that it did.
>
> Q. In view of the whole history it is not a little more likely that it started at the time this fatigue started? A. I would think so."

The witness further stated that it was "quite possible" that a man could develop as much tuberculosis as the applicant had within a period of six months. [R. p. 30.] With respect to the exposure to bad weather, as a responsible factor, the witness stated: "I think that if he is exposed to bad weather the effect would be the same here as in the Tropics." [R. p. 31.]

In no respect can the foregoing testimony be said to rise above the level of speculation and conjecture. Certainly there is no evidence whatever that the exposure to tuberculosis on the part of Mr. Donoho was greater than that of the people on the island of Samoa in general. Tuberculosis is not a tropical disease and not confined to the regions in which Mr. Donoho was working. The risk to which he was exposed is not shown to be any different or any greater than that to which he would have been exposed had he driven a truck or run a mess hall anywhere in the United States. Exhaustion and overwork are not conditions peculiar to his employment, but

are incidents of all occupations in which physical work or long hours, or both, are demanded of the employees.

It is well known, as the report of appellants' expert shows, that tuberculosis is no respecter of age, occupation, sex or clime. We respectfully submit, therefore, that the compensation order, whether it is construed to mean that the appellee contracted tuberculosis on the Island of Samoa, or whether it is said to mean that he had an arrested case of tuberculosis which flared up in Samoa is not supported by substantial evidence and that therefore, as a matter of law, the award must be set aside.

IV.

A Finding of Fact Showing the Cause of the Injury in the Alternative Does Not Support a Compensation Order.

The deficient state of the evidence and the confusion in which one's mind—including the mind of the Deputy Commissioner—is left thereby, is best illustrated by his finding, reading as follows:

> "That said inactive tuberculosis was caused to develop and become disabling either by contraction of an original infection from unknown sources or by reactivation of a previously undiscovered and arrested pulmonary tuberculosis, by conditions of his employment above mentioned, particularly overwork and exposure."

This is a finding in the alternative and, as such, is objectionable. If nothing further were done the case should be remanded to the Commissioner in order to

make a finding electing between the alternatives quoted above.

The reference in the finding quoted above to an infection "from unknown sources" is a profession of the Commissioner's inability of the fact of causation and is, therefore, not a finding of fact. It should be disregarded.

This leaves as an alternative only the Commissioner's reference to "reactivation of a previously undiscovered and arrested pulmonary tuberculosis." There is as to that finding not one scintilla of evidence to sustain it. A fluoroscopic physical examination was given to the applicant prior to his departure for the island and, moreover, there appears on page 8 of the Record the result of a medical examination on February 22, 1942, which was based on a complete blood test and fluoroscopic examination, to the effect that the lungs are normal and that there was no previous history of tuberculosis. [R. p. 8, lines 19 to 23.] This was the applicant's evidence, which was further substantiated by his own medical expert, to the effect as already quoted, that from the medical standpoint this was a mixed type of tuberculosis, but that it was impossible to state whether there may have been an earlier or arrested or inactive condition. [R. p. 25, lines 17 f.]

That an award in the alternative is objectionable, especially since neither of the alternatives bring the claimant's case with the purview of the act, is well demonstrated in the case of *Greenberg v. Greenberg*, 193 App. Div. 574, where the deceased had been killed in an

elevator which he was using to bring material to an upper floor.

> "The evidence was such that it was not known whether the deceased attempted to stop the elevator or whether the mechanism was so jarred or struck that it automatically began to operate. In this dilemma the Industrial Commission made the alternative finding that:
>
> " 'The said elevator was set in motion either by the deceased attempting to run the same or the mechanism of the same having got caught in the large sheets of canvas that were being taken to the upper floors.' "

The New York Court said:

> " 'Having made no decision between the two alternatives expressed, the commission has not eliminated the contingency that the deceased was killed by running the elevator himself. We express no opinion as to whether the evidence would bear the construction that the elevator started automatically preferring as the wiser course the remission of the case to the commission, not only for corrected findings but for the taking of further proof if the same appeared desirable.' "

Conclusion.

It is respectfully submitted that the record does not support a finding of fact that the misfortune of appellee William Donoho was caused by a special hazard or exposure which in the natural course of events produced tuberculosis as an occupational disease.

It is further respectfully submitted that a lack of evidence and the conjectural nature of the compensation order are reflected in the Deputy Commissioner's finding of

fact in the alternative leaving the cause of the disease and the possibility of its occupational origin entirely in the air, and that therefore said finding in the alternative does not support an award in favor of the claimant.

It is naturally deplorable that a man, apparently healthy when leaving the mainland, should find himself in this unfortunate condition, but the larger aspects of the situation dictate that the Defense Bases Act, truly an industrial compensation act, comprising accidental injury and occupational disease, should not be converted into a health insurance measure. Congress obviously did not have that intention, and it should not be read into the act by judicial interpretation.

For the foregoing reasons, it is respectfully submitted that the District Court erred in dismissing the complaint and denying injunction.

Respectfully submitted,

CLAUDE F. WEINGAND,

Attorney for Appellants.